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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-944

TIME, INC., PETITIONER,

v.

MARY ALICE FIRESTONE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The first opinion of the Florida Supreme Court initially rejecting petitioner's Federal constitutional claims and remanding the cause to the District Court of Appeal for consideration of state law issues, (A. 594) is reported at 271 So. 2d 745. The subsequent opinion of the District Court of Appeal on that remand, holding for petitioner on the state law issues and directing entry of judgment in favor of petitioner, (A. 611) is reported at 279 So. 2d 389. The second opinion of the Florida Supreme Court, finally rejecting petitioner's Federal constitutional claims, quashing the decision of the District Court of Appeal in favor of petitioner, and remanding the cause with directions to reinstate the jury verdict and enter final judgment thereon in favor of respondent, (A. 621) is reported at 305 So. 2d 172.*

*Opinions and orders of the lower courts, prior to the first opinion of the Florida Supreme Court, are, in chronological order, as follows: The original opinion of the Trial Court granting summary judgment for petitioner, is not officially reported. The first opinion of the District Court of Appeal reversing that grant of summary judgment, is reported at 231 So. 2d 862. The judgment in favor of respondent following trial and jury verdict (A. 575), is not officially reported. The second opinion of the District Court of Appeal (A. 585), holding for petitioner on Federal constitutional and state law grounds, and reversing and remanding with instructions to enter judgment in favor of petitioner, is reported at 254 So. 2d 386. That opinion was followed by the two opinions of the Florida Supreme Court and the intervening opinion of the District Court of Appeal described above in the text.

JURISDICTION

The final opinion and order of the Supreme Court of Florida, quashing the decision of the District Court of Appeal in favor of petitioner and directing final judgment in favor of respondent was entered December 11, 1974 (A. 621). The petition for a writ of certiorari was filed January 31, 1975, and was granted April 14, 1975. The jurisdiction of this Court rests on 28 U. S. C. § 1257(3) on the ground that there is involved and petitioner claims the right to privilege and immunity protection under the Constitution of the United States.*

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*The petition brings before this Court both decisions of the Florida Supreme Court—the first decision which initially rejected petitioner's Federal constitutional claims, and the second decision which finally rejected those claims and disposed of the state law issues.

In opposing the petition, respondent argued specifically that this Court lacks jurisdiction to review the first decision, and inferentially that it lacks jurisdiction to review the case at all, because petitioner should have sought review in this Court when the first decision was entered in December 1972 (Br. Opp. 2-4, 10). Our reply brief pointed out (1-5) that this argument was clearly erroneous and that this Court has jurisdiction because, *inter alia*: (1) there was no final judgment until the second decision was entered December 11, 1974, adversely disposing of the constitutional and state law issues previously decided in petitioner's favor; (2) the second decision also passed on petitioner's Federal constitutional claims, and petitioner can advance and this Court can consider any arguments in support of those claims even though they were not raised or considered below; and (3) the possibility that petitioner might have obtained review following the first decision under the principles subsequently announced in the intervening decisions of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), and *Cox Broadcasting Corp.* v. *Cohn*, U. S. , 95 Sup. Ct. 1029 (March 3, 1975), does not deprive this Court of jurisdiction to consider petitioner's Federal constitutional claims in all of their aspects following the conclusion of the state court litigation.

Since this Court granted certiorari without directing the parties to argue any question as to jurisdiction, we assume that this Court is satisfied that it has jurisdiction. If this assumption should be incorrect, we request the opportunity to brief the reasons why the jurisdiction of this Court is clear.

QUESTIONS PRESENTED

1. Was the Supreme Court of Florida in error under the First Amendment because it imposed liability without fault with respect to a routine news item reporting a judicial decision accurately, carefully and competently?

2. Was petitioner's news item a rational interpretation of an ambiguous judicial opinion and thus entitled to First Amendment protection so that failure of the Supreme Court of Florida to affirm dismissal of the action was error?

3. Was the Supreme Court of Florida in error because of its failure (a) to impose an "actual malice" standard of proof under the First Amendment upon a plaintiff who had instituted and been drawn into a particular public controversy which commanded a substantial amount of independent public interest and who brought suit with respect to a routine news item reporting accurately, carefully and competently a judicial decision that was given nationwide coverage because of the prominence of the parties involved in that particular public controversy, and (b) under that standard to affirm dismissal of the action?

4. Did respondent's explicit withdrawal of any claim for damage to reputation arising from a routine news item reporting a judicial decision make mandatory imposition of an "actual malice" standard of proof under the First Amendment so that the failure of the Supreme Court of Florida to impose that standard and affirm dismissal of the action was error?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments. United States Constitution, Amendment I, Amendment XIV § 1.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances," U. S. Const., amend. I.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner is the publisher of the weekly newsmagazine, TIME. Respondent brought this action for libel based on an item which appeared in the Milestones section of TIME dated December 22, 1967, but which closed on Saturday, December 16, 1967, concerning a decision of the Circuit Court, Palm Beach County, Florida, rendered December 15, 1967. The item stated as follows (Pl. Ex. 1, A. 96, 522):

> "Divorced. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone,

> 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'"

The decision thus reported was rendered on Friday, December 15, 1967, at 4:39 p.m. At 6:52 p.m. that evening petitioner received an AP dispatch which, in pertinent part, read as follows (Def. Ex. 1, A. 99, 543):

> "WEST PALM BEACH, Fla. AP—Millionaire industrial heir Russell A. Firestone Jr. was granted a divorce Friday from his third wife, a former West Palm Beach school teacher he had accused of adultery and extreme cruelty."

Later that evening petitioner received the New York Daily News for December 16, 1967, which, in pertinent part, read as follows (Def. Ex. 3, A. 406, 545):

> "West Palm Beach, Fla., Dec. 15 (Special)—The stormy, scandal-ridden divorce trial of millionaire Russell A. Firestone Jr. ended today when the rubber and oil heir was granted a divorce from his third wife, a statuesque onetime West Palm Beach schoolteacher, who had been accused of adultery."

On December 16, 1967, in response to a query sent to petitioner's Miami bureau, petitioner received a dispatch at 11:52 a.m. from Richard Duncan, head of that bureau, which in pertinent part, read as follows (Def. Ex. 2, A. 230, 544):

> ". . . Judge James Knott commented: 'According to certain testimony in behalf of the defendant (Rus-

sell), extra marital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in the plaintiff's behalf, would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr.'"

Finally, at 1:25 p.m. on December 16, 1967, petitioner received a dispatch from Robert Delaney, Palm Beach "stringer" working on a special assignment basis, which, in pertinent part, read as follows (Pl. Ex. 4, A. 101, 532):

> "... The technical grounds for divorce according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery. ..."

Based on those two items and two dispatches, the TIME editorial team, consisting of Ursula Nadasdy, researcher, William Doerner, writer, and George Daniels, Sr. Editor in charge of the Milestones section of TIME magazine, wrote, edited and checked for accuracy the item on which suit was brought. All testified at the trial as to their complete belief in the truth of the news item both at the time of the publication and at the time of the trial (A. 239-41, 267, 304, 338-39).

The actual opinion in *Firestone* v. *Firestone*, on which report was made in TIME's Milestones item but which the editorial personnel had not seen prior to publication, is essentially the same as the two news items and two dispatches on which the TIME item was based. If one excludes those portions of the opinion which merely give the fact of marriage and residence, deal with financial disputes between the parties or cite authority, the opinion reads as follows (Pl. Ex. 2, A. 96, 523-29):

"This cause came on for final hearing before the court upon the plaintiff wife's second amended complaint for separate maintenance (alimony unconnected with the causes of divorce), *the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery,* and the wife's answer thereto setting up certain affirmative defenses. ... (Italics added)

"....

"According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated. ...

"....

"In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.

"....

"ORDER AND ADJUDGED as follows:

"1. That the equities in this cause are with the defendant; *that defendant's counterclaim for divorce be and the same is hereby granted,* and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved. (Italics added)

". . . .

"4. That the defendant shall pay unto the plaintiff the sum of $3,000 per month as alimony beginning January 1, 1968, and a like sum on the first day of each and every month thereafter until the death or remarriage of the plaintiff."

After demand for retraction (A. 541) was made and refused, this action was commenced March 12, 1968, based on respondent's contention—squarely belied by the express statements in the divorce court's opinion that the husband's "counterclaim for divorce on grounds of extreme cruelty and adultery" was "hereby granted"—that she had not lost the divorce case on the ground of adultery and, for that reason, her reputation had been damaged (A. 8).* Based on the facts above stated, petitioner moved for summary judgment on First Amendment grounds, as made applicable to the States by the due process clause of the Fourteenth Amendment (A. 13).** That motion was granted by the trial court November 15, 1968, on the ground that "defendant's thorough investigation of the facts, prior to publication of the article conclusively shows a lack of malice or recklessness". The District Court of Appeal reversed January 26, 1970 (231 So. 2d 862), on the ground that summary judgment was not available as a procedural device in Florida where state of mind was an issue.

*Long after the publication in 1967 and the commencement of this action in 1968, the divorce decree was upheld on appeal. The District Court of Appeal affirmed without opinion in 1971. 249 So. 2d 719. The Supreme Court of Florida also affirmed in 1972, but with modifications, stating in its opinion that "lack of domestication" was not a ground for divorce, but that the decree could be sustained on the ground of "extreme cruelty", and gratuitously adding that the trial court had not found the wife guilty of adultery. 263 So. 2d 223.

**In its answer to the complaint petitioner asserted that the publication in suit was protected by the constitutional guarantees of freedom of the press embodied in the Constitution (A. 11); that Federal constitutional claim was properly preserved and passed upon as noted in the text which follows.

Final preparation for trial was then begun with two significant occurrences. First, the trial court, despite proof of the prominent press coverage which respondent and her marital litigation had received (A. 37-76), ruled that no constitutional issue was presented (A. 78). Second, after it became apparent that petitioner was going to meet vigorously the issue of damage to respondent's reputation, respondent was allowed to withdraw her claim for damage to reputation and to proceed "simply on the mental pain and anguish of Mrs. Firestone" (A. 77,444). The trial then proceeded, with all First Amendment objections renewed and reserved throughout, and resulted in a jury verdict of $100,000 for respondent, with a significant jury finding that no punitive damages would be allowed (A. 566).

On appeal the District Court of Appeal reversed on four common law grounds and, also, on the basis of the First Amendment, stating with respect to the latter (254 So. 2d at 389-90, A. 592-93):

"Time testified as to the elaborate procedures undertaken to insure the accuracy of its article. There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth.

* * *

"It is, therefore, our conclusion as a matter of fact and law that Time was guilty of no malice, that it took the precautions reasonably required under the circumstances. If the press were charged with correctly analyzing the legal intricacies of

each news item, their pages would remain empty of substance. All we can expect is an honest, careful attempt at truth and accuracy. We received it."

The Court's constitutional holding was grounded on its conclusion "that the divorce of Mary Alice Firestone was an event of great public interest"; it noted that she was possibly "a public figure" but said "we need not go that far to substantiate our result." (254 So. 2d at 389, A. 591)

The Supreme Court of Florida granted certiorari and reversed (271 So. 2d 745, A. 594) solely on the constitutional ground. Despite noting that respondent and her husband were "well known" and "prominent", that their divorce action was "a veritable *cause celebre*" which received national news coverage and "was unquestionably newsworthy", (271 So. 2d at 751-52, A. 605-06, 608) the Court inexplicably held that reports of the Firestone divorce "were not constitutionally protected as being matters of *real* public or general concern." (271 So. 2d at 752, A. 608, italics added). The Court did not consider other reasons warranting constitutional protection, such as whether respondent was a public figure, the fact that petitioner's news item was a report of judicial proceedings, and that it was in any event a reasonable interpretation of an ambiguous document. Instead, the Florida Supreme Court remanded the case to the District Court of Appeal for further consideration of the four common law issues. On remand, the District Court of Appeal adhered to its prior decision in favor of petitioner on those issues (279 So. 2d 389, A. 611). The Florida Supreme Court thereupon again granted certiorari and rendered its final decision, reversing and directing the entry of final judgment for respondent, and again rejecting petitioner's Federal constitutional claims, this time invoking the intervening decision of *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323

(1974), in support of the reversal—both as authority for the award of damages despite the fact that respondent had withdrawn her claim for damages to reputation, and as authority for the conclusion that petitioner's publication was "a flagrant example of 'journalistic negligence.'" (305 So. 2d 172, 176-77, 178, A. 627-28, 630). Petitioner accordingly now seeks reversal of the holdings of the Florida Supreme Court denying its claims to constitutional protection.*

INTRODUCTION AND SUMMARY OF ARGUMENT

The decisions of the Florida Supreme Court and its final judgment upholding the $100,000 verdict in favor of respondent must be set aside because they contravene the constitutional decisions of this Court beginning with *New York Times* in several respects. They impose liability with-

*When the Florida Supreme Court rendered its first decision, the doctrine of *New York Times* had been expanded to matters of "public or general interest" by *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971). By the time of the second Florida Supreme Court decision *Gertz* had cut back the constitutional protection for defamation of persons who are neither public officials nor public figures to the "less demanding" standard of negligence instead of the "actual malice" standard of *New York Times*.

For brevity and ease of reading, we shall refer in this brief to the First Amendment decisions of this Court by their shorthand names, *i.e.*, *New York Times*, *Butts*, *Gertz*, etc. Decisions so referred to include *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967); *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967); *Associated Press* v. *Walker*, 388 U. S. 130 (1967); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968); *Greenbelt Cooperative Pub. Ass'n* v. *Bresler*, 398 U. S. 6 (1970); *Time, Inc.* v. *Pape*, 401 U. S. 279 (1971); *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265 (1971); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974); *Cantrell* v. *Forest City Publishing Company*, 419 U. S. 245 (1974); *Cox Broadcasting Corp.* v. *Cohn*, U. S. , 95 Sup. Ct. 1029 (1975).

out fault, contrary to *Cox Broadcasting* and *Gertz*. They impose liability for a rational interpretation of an ambiguous document, contrary to *Pape*. They allow a public figure to recover for a report of a judicial proceeding in which she was involved even though there was no "actual malice", contrary to *New York Times, Butts, Gertz* and *Cox Broadcasting*. They impose liability without proof of actual damage and for material not damaging to reputation in the absence of "actual malice", contrary to *Hill* and *Gertz*.

These propositions and their application to the resolution of the questions presented in this case can best be considered against a background of certain factual conclusions appearing from the record and legal principles established by this Court which must be either undisputed or not subject to serious dispute.

On the factual side there are five such conclusions, as follows:

(1) There is no basis upon which the TIME Milestones item can be found to have been in error—at the very least, the item was a rational interpretation of an ambiguous document.

(2) Even if error be assumed, there is no basis upon which the error can be found to have been careless.

(3) Respondent was a public figure at the time the item was published.

(4) Even if error be assumed, there is no basis upon which the error can be found to have been made with "actual malice"—*i.e.*, with knowledge of falsity or serious doubts as to truth.

(5) There is no basis for a claim for damage to reputation for that claim was expressly withdawn.

On the legal side, it should be noted initially that the TIME Milestones item is entitled to constitutional protection

since it is editorial material and not commercial material even though the magazine is published for profit (*New York Times, Hill, Gertz*) and, under that constitutional shield, false defamation does not suffice to pierce the shield for there must also be knowledge of falsity, serious doubts as to truth or careless error (*New York Times, Garrison, Hill, Greenbelt, St. Amant, Gertz*). There remain six areas of legal principles established by this Court which prohibit imposing liability for the editorial material involved in this case as follows:

(1) A truthful report of a judicial decision (*Cox Broadcasting*).

(2) False defamation of a private figure absent careless error (*Gertz*).

(3) A rational interpretation of an ambiguous document (*Pape*).

(4) Erroneous report of a judicial decision absent knowledge of falsity or serious doubts as to truth (*New York Times, Cox Broadcasting*).

(5) False defamation of a public figure absent knowledge of falsity or serious doubts as to truth (*Butts, Gertz*).

(6) False material not damaging to reputation absent knowledge of falsity or serious doubts as to truth (*Hill, Gertz*).

The four questions presented in this case tie in with these five established facts and six established legal principles, as follows:

(1) Liability without fault—facts 1 and 2 and legal principles 1 and 2, *i.e.*, a truthful report of a judicial decision without careless error.

(2) Rational interpretation—fact 1 and legal principle 3, *i.e.,* a rational interpretation of an ambiguous judicial decision.

(3) Imposition of an "actual malice" test to defamation—facts 3 and 4 and legal principles 4 and 5, *i.e.,* the item a report of a judicial decision and respondent a public figure and no knowledge of falsity or serious doubts as to truth.

(4) Imposition of an "actual malice" test to false material not damaging to reputation—fact 5 and legal principle 6, *i.e.,* no damage to reputation and no knowledge of falsity or serious doubts as to truth.

Our argument which follows is founded upon the facts and principles thus outlined and this introduction thus gives the Court a convenient summary and capsule of that argument.

ARGUMENT

I.

THE SUPREME COURT OF FLORIDA HAS IMPOSED LIABILITY WITHOUT FAULT CONTRARY TO *COX BROADCASTING* AND *GERTZ* AND THUS CONTRARY TO THE FIRST AMENDMENT.

This Court's constitutional decisions—beginning with *New York Times* and extending through *Cox Broadcasting*—make clear that the First Amendment precludes imposing liability without fault, particularly when the publication reports "true information" which is "disclosed in public court documents". The news item in this case is clearly entitled to First Amendment protection, whether that protection be the "truthful" test of *Cox Broadcasting,* the strin-

gent "actual malice" test of *New York Times* and *Butts,* or the more limited shield provided by *Gertz.* But whatever the applicable test, the Supreme Court of Florida has exceeded constitutional bounds in imposing liability without fault. Moreover, it has done so solely on the basis of its claim that petitioner erred in reporting that respondent was divorced on the ground of adultery—a claim which lacks substance because the news item, despite the subsequent rationalization of the Florida Supreme Court, stated precisely that which the divorce decision that it reported had held.

a. *Petitioner truthfully reported a judicial decision.*

Subsequent to the decisions below, this Court held in *Cox Broadcasting* (95 Sup. Ct. p. 1047) that the public interest in having reports of judicial proceedings "will not allow exposing the press to liability for truthfully publishing information released to the public in official court records" and that "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast. See *Miami Herald Publishing Co.* v. *Tornillo, supra* at 258." (Footnote omitted.)

That is what petitioner did here. Based on the news items and dispatches before its editorial personnel, petitioner truthfully published what the Firestone divorce decree disclosed—that Russell Firestone's "counterclaim for divorce on grounds of extreme cruelty and adultery" had been "granted", and that respondent was accordingly divorced "on grounds of extreme cruelty and adultery". As the District Court of Appeal specifically found in holding for petitioner after the first reversal by the Florida Supreme Court, the "publication fairly and accurately

reported the final judgment [in the divorce proceeding]". 279 So. 2d at 394, A. 620.

Petitioner accordingly cannot be held liable for its report of the Firestone divorce. That report was accurate and truthful when it was made and is accordingly constitutionally protected under *Cox Broadcasting*.* No amount of after the fact explanation by the Florida Supreme Court of what the divorce decree meant or should have meant can deprive petitioner of that constitutional protection, particularly since, as we will now show, that would impose liability without fault contrary to the repeated holdings of this Court.

b. *There was no error, fault or negligence on the part of petitioner.*

Gertz holds (pp. 347-48) that "liability without fault" cannot be imposed in any defamation action instituted against a member of the "press". But that is just what the Florida Supreme Court has done here.

The editorial process presented to the trial court and to the Supreme Court of Florida, was clearly proper editorial procedure with respect to a newsworthy item reporting on a judicial decision of considerable public interest. Testimony by Researcher Nadasdy, Writer Doerner and Editor Daniels made that quite clear (A. 217-40, 257, 260-61, 266-67, 279-84, 292-95, 298-99, 302-09, 317-21, 323-29, 333-40). The item was written, edited and checked, based upon an AP dispatch and a New York Daily News clipping plus two specific written dispatches from Florida (A. 221-22, 224, 229-30, 232-34, 261, 279, 282, 284, 311, 318, 321, 325-29, 334-37). Those four documents gave precisely the same picture as does the opinion of the trial court in the

*Totally aside from the rightness or wrongness of petitioner's report, it was an interpretation. Compare *Gertz*, p. 339, "Under the First Amendment there is no such thing as a false idea."

Firestone divorce case itself, namely, that the divorce was founded both on extreme cruelty and adultery. There is thus no possible negligence, whether with "convincing clarity" or not and, again, no error. That lack of error is also significant in the fact that no retraction was given, a fact repeatedly stressed in argument in the trial court (A. 89, 139-40, 273, 286-87, 474, 476, 481-83, 507) and stressed by the Florida Supreme Court in both of its opinions in this action (271 So. 2d at 753-54, A. 609-10; 305 So. 2d at 174-75, A. 622-23). How can one retract that which is true? And how does that lack of retraction possibly make any difference whatsoever with respect to a constitutional defense either of lack of negligence or of lack of "actual malice", each of which must be judged by facts prior to publication and not that which took place after publication. The Florida Supreme Court seemed to be oblivious of this obvious fact.

There is simply no basis, on the facts of this case, for finding that petitioner was negligent or otherwise at fault. As the District Court of Appeal said in its opinion (254 So. 2d 389-90, A. 592-93):

> "Time testified as to the elaborate procedures undertaken to insure the accuracy of its article. There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth.
>
> * * *
>
> "It is, therefore, our conclusion as a matter of fact and law that Time was guilty of no malice, that it took the precautions reasonably required under the circumstances. If the press were charged with correctly analyzing the legal intricacies of each

news item, their pages would remain empty of substance. All we can expect is an honest, careful attempt at truth and accuracy. We received it."

Yet the Florida Supreme Court disposed of those categorical findings in a single paragraph of its last opinion, as follows (305 So. 2d at 178, A. 630):

> "Furthermore, this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news. *Gertz* v. *Welch, Inc.*, supra. Pursuant to Florida law in effect at the time of the divorce judgment (Section 61.08, Florida Statutes), a wife found guilty of adultery could not be awarded alimony. Since petitioner had been awarded alimony, she had not been found guilty of adultery nor had the divorce been granted on the ground of adultery. A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of 'journalistic negligence.'"

The Supreme Court of Florida thus found negligence based *solely* on its view that the TIME Milestones item was in error.* In so doing, it clearly departed from the rule running through all constitutional First Amendment cases

*The jury at the trial of this libel action never passed on the question of petitioner's fault, other than to refuse to award punitive damages and thus endorse petitioner's good faith, for the only issue given to the jury was that of truth (A. 508). Even the issue of qualified privilege to report judicial proceedings was given to the jury on the basis that the report must be accurate (A. 509).

commencing with *New York Times* that liability cannot be predicated solely on error. *New York Times,* p. 273, *Garrison,* pp. 73, 75, 78, *Hill,* pp. 387-88, *Greenbelt,* p. 10, *Gertz,* pp. 340-41.

And even that claim of error is erroneous, since there was no error. The Supreme Court of Florida seemed unable to grasp the elementary principle that the trial court in the Firestone divorce action did what it was not supposed to do, *i.e.,* it found adultery and also awarded alimony. But the fact that it was not supposed to do that cannot possibly prove that it did not do that, because that was precisely what it did. The fact that the Florida Supreme Court, some five years later, in its final decision with respect to the Firestone divorce case (263 So. 2d 223), upheld the "extreme cruelty" ground of the divorce award (p. 225), which made unnecessary investigation of the "adultery" ground of the divorce award, and gratuitously added that the trial court "did not find the wife guilty of adultery" (p. 225), cannot change what the divorce court did. That court, faced with a counterclaim for divorce by the husband founded both on "extreme cruelty and adultery", simply stated that "defendant's counterclaim for divorce be and the same is hereby granted"—which can only mean, in plain English, that it found for the husband on both adultery and extreme cruelty. Unless the plain meaning of the English language is to be completely disregarded in the Florida courts, the Florida trial court plainly did what the TIME item said it did, and the gratuitous remark five years later in the Florida Supreme Court opinion in the divorce case regarding the basis of the decision can no more change that than it can change black to white. Nor can it afford any basis for denying First Amendment protection to petitioner.

In arguing that the Supreme Court of Florida did not impose liability without fault, respondent erroneously relies

on a supposed conflict between Delaney, petitioner's Palm Beach "stringer", and Farish, attorney for respondent, with respect to the statement in Delaney's dispatch of December 16, 1967 (Pl. Ex. 4, A. 101, 532), that the "technical grounds for divorce according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery". Respondent also impliedly tries to create a conflict between Delaney and Judge Knott, who rendered the divorce decision, by pointing to Judge Knott's testimony that he did not tell Delaney that respondent was guilty of adultery, thus inferring that Delaney had testified that Judge Knott had told him that respondent was guilty of adultery.

To begin with, there is no conflict between Farish and Delaney. Farish testified explicitly that "I said Mr. Firestone had accused her of extreme cruelty and adultery" (A. 135) and agreed that he and Delaney had discussed that "the technical grounds for divorce as alleged in the complaint were adultery and extreme cruelty" (A. 147). Once this testimony is placed in context with the clear language of the opinion and judgment which was being reported ("defendant's counterclaim for divorce be and the same is hereby granted"—Pl. Ex. 2, A. 96, 528) the inescapable conclusion is that the grounds upon which the divorce was granted were extreme cruelty and adultery. No amount of argument can gainsay that fact, particularly when the opinion specifically noted, as reported in Duncan's (Miami bureau head) first dispatch (Def. Ex. 2, A. 230, 544), that the "extra marital escapades of the plaintiff" sufficed to "have made Dr. Freud's hair curl". There is no conflict.

Nor was there conflict between Judge Knott and Delaney for Delaney most certainly did not testify that Judge Knott told him respondent was guilty of adultery. He did testify that the subject was not mentioned with Judge

Knott (A. 359). He further testified that his dispatch (Pl. Ex. 4, A. 101, 532) was sent based on a conversation with Farish (A. 356, 363, 367-69) at a time when he could not reach Judge Knott (A. 357-58, 369) and that there was nothing in his conversation with Judge Knott, which occurred after the dispatch was sent, which was inconsistent with that dispatch (A. 370). He also testified that Judge Knott merely read portions of the opinion to him (A. 359, 370). There is no conflict.

Even if there were conflict, petitioner was not negligent or at fault. Delaney's knowledge is not pertinent to the constitutional inquiry. Precisely the same state of facts with respect to the knowledge of a reporter was presented to this Court in *Walker* in which the Associated Press relied on its reporter in the field. In dismissing that action, despite the fact that the reporter's testimony differed from that given by plaintiff Walker so that if the reporter's knowledge were relevant there was created an issue of fact sufficient to bar judgment for defendant, this Court disregarded the reporter's knowledge and stated (388 U. S. at 158):

> " . . . The Associated Press received the information from a correspondent who was present at the scene of the events and gave every indication of being trustworthy and competent. . . ."

To the same effect, see *Walker* v. *Pulitzer Pub. Co.*, 394 F. 2d 800, 805 (8th Cir. 1968), and *Firestone* v. *Time, Inc.*, 460 F. 2d 712, 721 (5th Cir. 1972), *cert. denied*, 409 U. S. 875.*

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*The Fifth Circuit *Firestone* case was a prior action brought by Mary Alice Firestone with respect to a Life article, also published by petitioner. There, however, the Fifth Circuit, unlike the Florida Supreme Court, protected petitioner's First Amendment rights so that there was no need for action by this Court, and this Court accordingly denied respondent's petition for certiorari.

This Court's recent decision in *Cantrell* v. *Forest City Publishing Co.*, 419 U. S. 245, further shows the fallacy of respondent's contention. There this Court held that the knowledge of the staff writer, Eszterhas, was the knowledge of his employer Forest City Publishing Company (419 U. S. p. 253-54) just as, of course, the knowledge of the New York editorial staff of petitioner would be implied to petitioner, for researcher Nadasdy, writer Doerner and editor Daniels were the persons "responsible for publication" (*New York Times,* p. 287). By the same token, this Court in *Cantrell* dismissed the action against photographer Conway on the ground that he "was not shown to have participated" in the editorial process (419 U. S. p. 253 n. 5). Delaney is in the same posture. Since he did not participate in writing or editing the TIME item, his knowledge will not be implied to petitioner and is immaterial to the constitutional inquiry.

In this case, the ample precautions taken by petitioner in publishing the Milestones item clearly negate any finding of "actual malice". These exhaustive precautions also clearly constitute compliance with the standard of "reasonable conduct in the light of the apparent risk"* and thus preclude any finding of negligence.

The burden is, of course, on respondent to prove that petitioner was at least negligent in the sense of the constitutional standard mandated by *Gertz*. (This point need never be reached if petitioner's "public figure", "report of judicial proceedings", and other arguments are accepted.) If this were an ordinary negligence case, respondent would have to carry that burden by a preponderance of the evidence—*see, e.g., Prosser on Torts* 208-09 (4th ed. 1971). But because First Amendment rights are involved here, respondent has the burden of showing negligence with

**Prosser on Torts* 324 (4th ed. 1971).

"convincing clarity". That is the burden which public officials or public figures must carry to prove the "actual malice" required by the *New York Times* rule; not only must they prove "actual malice", but they must do so with "the convincing clarity which the constitutional standard demands. . . ." 376 U. S. at 285-86. The requirement of negligence which *Gertz* applies to private defamation plaintiffs, although "less demanding" than the "actual malice" requirement of *New York Times,* is also a constitutional standard and private plaintiffs must accordingly prove negligence with "convincing clarity".

Respondent cannot show that petitioner was negligent here under any standard of proof, let alone by proof of "convincing clarity". The fact remains that liability without fault was imposed on petitioner, contrary to the command of the First Amendment.

II.

PETITIONER'S NEWS ITEM WAS A RATIONAL INTERPRETATION OF AN AMBIGUOUS DOCUMENT UNDER *PAPE* AND THUS ENTITLED TO FIRST AMENDMENT PROTECTION.

The holdings of the Florida Supreme Court are incompatible with this Court's opinion in *Time, Inc.* v. *Pape,* for a "rational interpretation of an ambiguous document" can no more be the basis for a finding of fault than it can be for a finding of "actual malice". The District Court of Appeal dealt with this matter in its opinion as follows (254 So. 2d 390, A. 592-93):

> "The wording of the divorce decree was ambiguous. At least two reasonable interpretations were available—that plaintiff was found an adulteress

as charged in the complaint, or that she was not an adulteress because of the incongruity of such a finding with an award of alimony.

"The testimony at trial, some deemed too spicy for public sessions, implicated both parties in compromises to marital fidelity. The wording of the divorce decree itself would lead a reasonable person to conclude adultery had been committed, '[a]ccording to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr.' Part of this language was reproduced exactly in Time's article.

"In addition to Time's rational interpretation of the pleadings, testimony and decree, it investigated independently at length. It contacted its Miami bureau and its Palm Beach stringer several times by wire and phone to substantiate information. Plaintiff's attorney and the judge were called for verification."

In writing the report in this case, the TIME personnel had before them an AP dispatch which directly quoted from the language of the final decree describing the plaintiff's "extramarital escapades" (Def. Ex. 1, A. 99, 543). The same language was quoted in a second dispatch (Def. Ex. 2, A. 230, 544) and in a newspaper report (Def. Ex. 3, A. 406, 545) which they had. Adultery is specifically mentioned no less than three times in the dispatches and newspaper stories they had before them (Pl. Ex. 4, A. 101, 532; Def. Ex. 1, A. 99, 543; Def. Ex. 3, A. 406, 545). And one

dispatch asserted "as fact" that adultery was a ground for the divorce (Pl. Ex. 4, A. 101, 532).

The article involved in the *Pape* case reported on a Civil Rights Commission report in the identical way that the article involved in this case reported on a Florida Circuit Court decision, *i.e.*, the Firestone divorce. In each instance it was necessary that the article interpret that which was being reported on—and in each instance the article was a "rational interpretation" (*Pape*, p. 230). In *Pape* the rational interpretation was to leave out the word "alleged". Here, the rational interpretation was to state—not that respondent had been accused of adultery, which she had—but that she had been divorced on the ground of adultery, since the decree granted the husband's counterclaim charging her with adultery. Petitioner was right in so reporting, but the Constitution does not require petitioner to be right. A rational interpretation is all that is required, and petitioner clearly met that requirement.

III.

PETITIONER'S NEWS ITEM WAS A REPORT OF A JUDICIAL DECISION UNDER *COX BROADCASTING* AND RESPONDENT WAS A PUBLIC FIGURE UNDER *GERTZ* AND ON EITHER GROUND AN "ACTUAL MALICE" TEST SHOULD HAVE BEEN APPLIED AND THE ACTION DISMISSED ON FIRST AMENDMENT GROUNDS.

The facts of this case preclude any finding that the publication was made with "actual malice"—*i.e.*, that petitioner published with knowledge that the article was false or with serious doubts of its truth. Even the Supreme Court of Florida went no further than to say that petitioner was negligent, and that conclusion was erroneous as shown in Point I, *supra*. Since the "actual malice" test should have been applied here, because the article was a report of a

judicial proceeding and because respondent was a public figure (at least for the purpose of that proceeding), the decisions of the Florida Supreme Court must be reversed.

a. *The "actual malice" test should apply to reports of judicial proceedings.*

The holdings of the Florida Supreme Court will make it impossible for the press to report judicial decisions, particularly in any current and meaningful way. This Court has long emphasized the important function performed by the press in informing the public of court proceedings and the maximum freedom and special protection which must be given to the press in carrying out that function. *See, e.g., Craig* v. *Harney,* 331 U. S. 367, 374 (1947); *In re Oliver,* 333 U. S. 257, 268 (1948); *Estes* v. *Texas,* 381 U. S. 532, 539, 541-42 (1965); *Sheppard* v. *Maxwell,* 384 U. S. 333, 350 (1966). This line of decisions was recently capped by *Cox Broadcasting,* holding that the press cannot be sanctioned for "truthfully publishing information" released in official court records, or for publishing "true information" disclosed in public court documents. As pointed out in Point I.a., *supra,* petitioner is entitled to reversal for that reason alone. However, even if petitioner erred or was otherwise at fault, which it was not, petitioner still should not be liable because the public interest in having reports of judicial proceedings requires application of the "actual malice" test. If the holdings of the Florida Supreme Court are sustained, the press will not be able to serve that public interest.

The Supreme Court of Florida has apparently decreed that a publisher cannot safely report a court decision unless he satisfies all of the following requirements—

> —A copy of the decision must be obtained before publication. It is not enough to publish on the basis of descriptions of the decision.

> —The decision must be carefully analyzed for inconsistent statements and legal rationale. It is not enough to report what a court said it did. A publisher must report what the court *should* have said it did.
>
> —A publisher must anticipate what a reviewing court, long after the event (five years here), will say a lower court held or should have held.

These requirements are not only absurd—if petitioner had had a copy of the Firestone divorce decision when its Milestones item was written, the item would have been exactly the same, for that opinion expressly granted the husband's counterclaim and stated that the counterclaim was for "extreme cruelty and adultery", and those facts cannot be changed. More importantly those requirements frustrate the public's right to have current and meaningful reporting of judicial decisions. A publisher would be at risk even if he simply printed the full text of the decision. And there would be inordinate delay.*

Such a stultifying result cannot be squared with the First Amendment and the cited decisions of this Court emphasizing the public's right to be informed of judicial proceedings. Published reports of judicial proceedings, like discussions of public officials and public figures, cannot

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*If petitioner had printed the full text of the divorce court's opinion, instead of its Milestones summary, it would still be liable under the rationale of the Florida Supreme Court. For that decision conveyed to the public exactly what petitioner reported—that respondent had been divorced on grounds of extreme cruelty and adultery.

Delay is also inevitable. In many instances it will be some time before the exact decision can be obtained. Further delay would result from the need to flyspeck the decision for error. Even in the case of decisions of this Court, such requirements would substantially delay reporting—decisions rendered on a Monday, which are now routinely reported throughout the country on Monday evening or Tuesday morning, could not possibly be reported upon until the end of the week. And even then a publisher would be liable if he printed a decisional error defaming someone.

give rise to liability for defamation unless the defamatory statements are made with "actual malice" in the *New York Times* sense. The First Amendment values which protect discussion of public officials apply with equal force to discussion of judicial proceedings.

The solicitude shown by this Court with respect to reports of judicial proceedings emphasizes the importance of maintaining an unrestricted flow of information about judicial proceedings to the public. In *Estes* v. *Texas,* 381 U. S. at 539, this Court recognized:

> "The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences including court proceedings."

And in *Sheppard* v. *Maxwell,* 384 U. S. at 350. this Court reiterated:

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '[w]hat transpires in the court room is public property.' *Craig* v. *Harney,* 331 U. S. 367, 374 (1947)."

This solicitude cannot be surprising in our system of government where the courts are a coequal branch and the common law as expressed in judicial decisions regulates many facets of society's relationships.

The common law early recognized that actions for defamation based on reports of the activities of the courts had a chilling effect on the obligation of the press to report to the public. The response was the recognition of a privilege. In *King* v. *Wright,* 101 English Reports 1396, 1399 (Kings Bench 1799), Justice Wright explained:

> "The proceedings of Courts of Justice are daily published, some of which highly reflect on individuals. . . . Many of these proceedings contain no point of law, and are not published under the authority or the sanction of the Courts; but they are printed for the information of the public. . . . Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings."

The common law privilege to report on judicial proceedings was limited to reports which were fair and accurate. However, the same factors which weigh in favor of the strategic protection accorded the press for defamatory falsehoods concerning public officials and public figures are present in reports of judicial proceedings regardless of whether the report involves public officials, public figures or individuals who might otherwise not be considered pub-

lic figures.* The overriding public interest in the free flow of information on the workings of the judiciary demands the same "breathing space" given publications concerning public officials. The risk of self-censorship and timidity naturally arising from the spectre of punishment of error in reports of judicial proceedings must tip the scales in favor of limiting the maintenance of defamation actions to those situations in which there is knowledge of falsity or serious doubts as to truth. Indeed, the opinion in *New York Times* itself strongly suggests that reports of judicial proceedings should enjoy the protection of the "actual malice" standard. 376 U. S. at 272-73. And Dean Prosser has concluded that the *New York Times* rule applies to the privilege for reporting judicial proceedings, noting that "it seems beyond dispute that even if the report is an inaccurate one, it is privileged unless it is made with knowledge of the falsity or in reckless disregard of its truth." *Prosser on Torts* 832 (4th ed. 1971).

The fact of the matter is that, with a report of judicial proceedings, the standard must be "actual malice". Indeed, this was suggested by Mr. Justice White in his concurring opinion in *Metromedia* (403 U. S. at 61, 62):

> " . . . Discussion of the conduct of public officials cannot, however, be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place. . . .
>
> * * *
>
> "I would accordingly hold that in defamation actions, absent actual malice as defined in *New York*

*It is difficult to conceive that an individual who is a party to a judicial proceeding is not a "public figure" under the tests of *Butts* and *Gertz*, at least for the purpose of reports of that proceeding.

> *Times Co.* v. *Sullivan*, the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view."

That doctrine has now been implicitly approved, we submit, by this Court in *Cox Broadcasting*.

b. *The "actual malice" test applies because respondent was a public figure.*

Additionally, the result below cannot be squared with this Court's decisions in *Butts* and *Gertz* that public figures must prove "actual malice" to recover for defamation. Under all relevant tests, respondent was a "public figure". Indeed, the Milestones section in TIME magazine is limited to "important events in the lives of important people" as testified by writer Doerner at the trial (A. 318). Respondent was "drawn into a particular public controversy" (*Gertz*, p. 351), indeed she initiated it, and "commanded a substantial amount of independent public interest" (*Butts*, p. 154).

It is likely that the facts, recited by the Supreme Court of Florida in its first opinion (271 So. 2d at 751, A. 605), that:

> "[P]etitioner and her ex-husband were well known. They were prominent among the '400' of Palm Beach society, and were also active members of the sporting set,"

are sufficient to make respondent an individual of "such pervasive fame or notoriety" that she has "become a public

figure for all purposes and in all contexts." (*Gertz*, p. 351) However, such a broad finding is not required since it is absolutely clear that respondent was a public figure under any relevant test with respect to reports of the divorce. Therefore, we adhere to this Court's admonition in *Gertz* (p. 352):

> "It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."

After referring to the general prominence of the Firestones, the Supreme Court of Florida continued its discussion of the facts showing respondent's public figure status thusly (271 So. 2d at 751, A. 605-06):

> "Sadly, however, their marital difficulties were equally well known; and the charges and countercharges of meretriciousness, flowing from both sides of the controversy, made their divorce action a veritable *cause celebre* in social circles across the country. Additionally, as the District Court observed:
>
> 'The divorce trial . . . lasted seventeen months and . . . [d]ue to the social position of the participants and the sensational, colorful testimony at the trial, there was national news coverage.
>
> 'The Associated Press flashed news of the decree within hours of its issuance. The Miami Herald and the New York Daily News ran articles the next day. They, among other national newspapers, had been following the trial from its inception in their news columns. . . .'

> Finally, on the point of notoriety, it appears that petitioner granted several interviews to news media during the divorce action and allowed herself to be quoted in relation thereto."

The Supreme Court of Florida's characterization of the Firestone divorce trial as a *cause celebre* is well documented in the record. Even a cursory examination of the news clippings attached as exhibits to the Bueno and Wilson affidavits (A. 37-76) shows that the divorce proceedings received daily publicity. Under any rational definition, the Firestone divorce was a public controversy about which the press had a duty to report, and respondent was a public figure in that context. Notwithstanding this obvious fact and the findings of the District Court of Appeal, the Supreme Court of Florida, although noting that the Firestones were prominent and their divorce proceeding was newsworthy and had received widespread publicity, held that reports of the Firestone divorce "were not constitutionally protected as being matters of *real* public or general concern" (271 So. 2d at 752, A. 608, italics added). This holding is not only erroneous but displays the same proclivity of the Florida Supreme Court to usurp the editor's function which this Court condemned in *Tornillo*. Public controversies involving public figures are not limited to government operations. *See* the concurring opinion of Chief Justice Warren in *Butts* (pp. 163-64) which a majority joined. As the Court stated in *Hill* (p. 388):

> "The guarantees for speech and press are not the preserve of political expression or comment on public affairs, essential as those are to healthy government. . . . 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information

> is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill* v. *Alabama,* 310 U. S. 88, 102."

Respondent was a central figure in a public controversy. Therefore, she clearly comes within the ambit of one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure". (*Gertz,* p. 351).

When the public controversy is a judicial proceeding, the concurrence of the interests underlying the protection required for reports of judicial proceedings and public figures commands that the "actual malice" test be applied. Such an approach is consistent with the rationale of *Gertz* which eschewed distinctions based on types of speech in favor of distinctions based on the status of the person defamed. Both interests are served by a determination that a party to a judicial proceeding is a public figure for the purposes of reporting that proceeding. For a plaintiff like respondent, the bringing of a lawsuit involves, in some measure, the decision to put one's disputes before a public tribunal and thereby forego a degree of anonymity, the principal "normative consideration" justifying different treatment for public and private individuals. And defendants in lawsuits are likewise individuals "drawn into a particular public controversy". Whether a defendant has become a public figure "voluntarily" depends on the definition of purposeful activity. Certainly a person who commits a crime has engaged in purposeful activity, although it is unlikely that he would consider himself a voluntary participant in a criminal trial. See *McFarland* v. *Hearst Corp.,* 332 F. Supp. 746 (D. Md. 1971), holding that the plaintiff, in a libel action, by committing a crime had made himself a public figure. And in *Edmiston* v. *Time, Inc.,* 257 F. Supp. 22 (S. D. N. Y. 1966), the

plaintiff had brought an action alleging that reports of a rape prosecution in which she had been the complaining witness were false. In sustaining the defendant's assertion that the publication was protected by the common law privilege for reports of judicial proceedings the court stated (pp. 26-27):

> "Thus, persons such as plaintiff who become associated, even unwittingly, with crime or other interesting events become in effect public figures at least for the time. . . ."

Respondent is thus plainly a public figure by reason of being plaintiff in the Firestone divorce. She is also to be classed as a public figure because of her relationship to Russell Firestone. The class of public figures has been defined to include "artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done". *Cepeda* v. *Cowles Magazines and Broadcasting, Inc.,* 392 F. 2d 417, 419 (9th Cir. 1968), *cert. denied,* 393 U. S. 840. Beyond any possible doubt Russell Firestone fits that definition. When respondent became embroiled in a public controversy because of her relationship to Russell Firestone she became a public figure. This obvious point was made recently in *Meeropol* v. *Nizer,* 381 F. Supp. 29 (S. D. N. Y. 1974). *Meeropol* was an action for defamation and invasion of privacy brought by the sons of Ethel and Julius Rosenberg and arose from the publication of an account of the Rosenberg-Sobell espionage trial. The plaintiffs sought to take advantage of the change in constitutional focus made by *Gertz.* But the court rejected their arguments holding (p. 34):

> "The teaching of *Gertz,* nonetheless, avails plaintiffs little; its applicability to the present case

is severely limited. Under the tests enunciated in *Curtis* and *Gertz,* plaintiffs surely must be classed as public figures. Beyond any doubt, they have 'assumed roles of especial prominence in the affairs of society' and 'they invite attention and comment'. *Gertz, supra,* 418 U. S. at 345, 94 S. Ct. at 3009.

"As children of the Rosenbergs, the plaintiffs spent much of their early years in the public spotlight. The activities of their parents were monitored by book, magazine and newspaper throughout the world. As children of famous parents, they achieved 'general fame or notoriety in the community'."

Respondent argues that the public figure issue is being now raised for the first time. There are two dispositive answers to this erroneous argument:

First, it is completely contrary to the record. Petitioner argued public figure throughout, from the trial court to the second decision of the Florida Supreme Court.*

Second, it is immaterial whether petitioner argued public figure below. The Federal question under the First and Fourteenth Amendments having been properly raised below, petitioner may urge and this Court may consider any arguments upon the Federal question, for, as said in *Dewey* v. *Des Moines,* 173 U. S. 193, 198, "[p]arties are not confined here to the same arguments which were advanced in the [state] courts below upon a Federal question there discussed."

*The point was consistently presented, *inter alia,* in petitioner's answer (A. 11), its pre-trial statement (A. 30), its requests for instructions (A. 557), its motions for directed verdict and new trial (A. 409, 546, 566, 569), its briefs on appeal, and its supplemental brief, submitted to the Florida Supreme Court on the second appeal, following the decision of this Court in *Gertz.* Petitioner also submitted proof as to public figure in the form of affidavits showing the extensive prior publications regarding respondent in the *Miami Herald, Palm Beach Post* and *Palm Beach Times* (A. 37-76). The public figure matter was also discussed in the 1971 decision of the District Court of Appeal (254 So. 2d at 389, A. 91) and in the first decision of the Florida Supreme Court (271 So. 2d at 751, A. 605).

IV.

ANY CLAIM FOR DAMAGE TO REPUTATION HAVING BEEN WITHDRAWN, THIS CASE IS GOVERNED BY *HILL* AND *GERTZ* SO THAT AN "ACTUAL MALICE" TEST SHOULD HAVE BEEN APPLIED AND THE ACTION DISMISSED ON FIRST AMENDMENT GROUNDS.

The withdrawal of respondent's claim for damage to reputation requires the imposition of an "actual malice" standard for three reasons. First, in permitting the states to condition liability on a lesser degree of fault than "actual malice", this Court held in *Gertz* that absent proof of "actual malice", only actual damages could be recovered. Respondent could not (and did not) prove such damages. Second, since the rule of the *Gertz* case is based on balancing of interests, removal of the states' prime interest—compensating damage to reputation—requires a readjustment in favor of a more "demanding" standard of proof. Third, by seeking damages solely for mental pain and anguish unrelated to damage to reputation, respondent in effect changed her cause of action to one for "false light" invasion of privacy, the same as the plaintiff in *Hill,* and must meet the same standard of proof.

That the interest which clashes with the First Amendment's guaranty of a free press in a defamation action is protection of reputation is the thread which runs throughout this Court's opinions since *New York Times. See Gar-*

rison, p. 73; *Rosenblatt,* p. 86; *Hill,* p. 391; *Butts,* p. 135; *Monitor Patriot,* pp. 270-76; *Pape,* p. 284; *Metromedia,* pp. 48-49; *Gertz,* pp. 343, 347-49. Most recently in *Cox Broadcasting* this Court reiterated that "in defamation actions * * * the protected interest is personal reputation . . ." (95 Sup. Ct. p. 1043). Accordingly, in making proof of actual damages a constitutional prerequisite for recovery in a defamation action, the Court in *Gertz* was concerned with damage to reputation. Without proof of damage to reputation, there is no cognizable actual damage for which to compensate a defamation plaintiff. Thus, in distinguishing their proposed right of privacy from libel and slander Warren and Brandeis note:

> ". . . The principle on which the law of defamation rests, covers . . . a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellowmen,—the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action." 4 Harv. L. Rev. 193, 197 (1890).

Plaintiff has argued (Br. Opp., pp. 18-19) that Mr. Justice Powell included mental suffering among the items of actual damage listed in *Gertz.* But that mental suffering, as recognized by Warren and Brandeis, is that which flows from

injury to reputation. Without that predicate there can be no proof of actual damages and, therefore, no recovery in the absence of proof of "actual malice".

In *Gertz,* this Court struck a balance between competing interests. On one side of the scale stood the freedom of the press guaranteed by the First Amendment. On the other weighed the states' concern with compensation for damage to reputation. With respect to private individuals the balance reached equilibrium at a point where liability for defamation may not be imposed on the press without fault. But just as the removal of a lead weight from one side of a balance will cause the other side to fall, respondent's withdrawal of a claim for damage to reputation must tip the scale in favor of a more "demanding" standard of proof. In short, even assuming (erroneously as we have shown above) that there are cognizable damages in a defamation action without loss of reputation, eliminating the chief component requires imposition of an "actual malice" standard.

The "actual malice" standard also applies under the *Hill* decision since, having withdrawn any claim for damages to reputation, respondent is in essentially the same position as the plaintiff in *Hill,* which necessitates the same test. As the Warren and Brandeis article pointed out, a claim for mental anguish unrelated to damage to reputation is basically a claim for invasion of privacy. Plaintiff Hill's action sought damages for an alleged falsehood which did not injure reputation. Thus, respondent here must meet the same standard of proof.

Since there was and can be no showing of "actual malice", the holdings below must be reversed.

CONCLUSION

If the constitutional guaranty of a free press is to mean anything as against a State Supreme Court which pays lip service to but ignores the decisions of this Court, this case must be reversed.

For the foregoing reasons, the order of the Supreme Court of Florida of December 11, 1974 (305 So. 2d at 178, A. 630-31), should be reversed and this case remanded to that Court with directions that the orders of the District Court of Appeal of Florida, Fourth District, of October 28, 1971, and June 20, 1973, be reinstated, and entry of judgment in favor of petitioner be directed.

May 27, 1975.

Respectfully submitted,

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